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IN THE

Supreme Court of the United States

October Term, 1956

No. 209

CHICAGO GREAT WESTERN RAILWAY COMPANY,
a corporation,
Petitioner,

vs.

LEON SCOVEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals, Eighth Circuit, entered in the above entitled cause on May 10, 1956.

OPINION BELOW

The opinion of the Circuit Court of Appeals, Eighth Circuit (App. "B", infra), is reported in —— F. 2d ——.

JURISDICTION

The judgment of the Circuit Court of Appeals, Eighth Circuit, was entered May 10, 1956 (App. "C", infra). The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. Section 1254 (1), App. "A", infra.

QUESTION PRESENTED

Whether the Circuit Court of Appeals, Eighth Circuit, erred in affirming the lower court's denial of defendant's motion for a directed verdict at the close of all the evidence, and in denying its motion for judgment notwithstanding the adverse verdict of the jury, on the ground that there was insufficient evidence for submission to the jury on the issue of defendant's negligence and that such negligence, if any, was the proximate cause of plaintiff's injuries.

STATUTE INVOLVED

The statutory provision involved is Section 51 of the Federal Employers' Liability Act, U.S.C., Title 45, printed in Appendix A, infra.

STATEMENT

This action was originally brought by plaintiff, Leon Stovel, against the defendant, Chicago Great Western Railway Company, in the United States District Court, District of Minnesota, Third Division, which Court had jurisdiction over said action by virtue of the Federal Employers' Liability Act, Title 45, U.S.C., Sec. 56.

At the time of the accident on June 25, 1953, out of which plaintiff's injuries arose, plaintiff was employed as a section

foreman by defendant. Shortly before the accident, which occurred about two and one-half miles east of Lamont, Iowa, plaintiff was sitting on a water keg approximately in the center of a railroad push car which was being pulled by a motor car along defendant's main line track extending between Stockton, Illinois, and Oelwein, Iowa (R. pp. 8, 12).

The morning was damp and misty (R. p. 12). The motor car, operated by plaintiff's son, Neal Scovel, was pulling the push car at a speed of about twelve to fifteen miles per hour, and had just reached the top of a slight grade (R. p. 12). In addition to plaintiff and his son, there were twelve other crew men riding on the two cars, five of whom were riding on the push car with plaintiff. Of these five, two, Mr. Graves and Mr. Stone, were sitting on the front end of the push car facing forward.

Plaintiff intended to take his crew it a spot about fifteen miles east of Lamont, Iowa, where they were going to work on the track and right-of-way. Before leaving Lamont on this particular morning, plaintiff testified he made a visual inspection of the motor and push cars in question and found them in good order and not defective (R. p. 12). The coupler connected with the push and motor cars by means of a pin bolt. (See Defendant's Exhibit A, R. p. 97) This pin bolt was approximately ten inches in length. It had no cotter pin or nut at the bottom end for the reason it could be pulled out quickly in case the cars had to be disengaged and removed from the track. The wheels on the push car were not loose and were in good working order (R. p. 15). In the locality where the alleged accident occurred, the road bed and track were well ballasted and in good condition (R. p. 11). During the twenty years plaintiff was section foreman he spent a good portion of the time working on this section of track and

was foreman when it was re-ballasted only a year before the accident.

The evidence as a whole shows that as the two cars carrying the fourteen men moved in an easterly direction out of Lamont, there was side sway and up and down motion of the cars but that it was a normal situation (R. p. 15). According to plaintiff, Ralph Graves was sitting Indian fashion, with his legs straight up in front of him, on the front end of the push car shortly before the accident occurred. There is no evidence that Graves had his feet against the motor car immediately before he fell. Plaintiff happened to glance forward and saw Mr. Graves partially under the push car hanging onto the bar across the front of it. Observing Graves so situated, plaintiff claims he stood up and stepped forward on the push car, placing his hands outward. There is no evidence that plaintiff dashed forward to rescue Graves as stated in the opinion of the Circuit Court (App. B, p. 19, infra). The push car had become disengaged and the motor car was slowing down, so plaintiff reached out for the hand rail of the motor car to keep it from coming together with the push car (R. pp. 8, 17). As he was doing this, plaintiff lost his balance and fell down between the motor and push cars. The push car passed over him and from that time on he remembers nothing else about the accident.

Plaintiff states that he does not know and did not observe whether the motor and push cars disengaged before or after Mr. Graves fell between them. *Neither plaintiff nor any witnesses could say how the accident happened or what caused him to fall.*

Plaintiff claimed the defendant was negligent in failing to furnish plaintiff with a reasonably safe place in which to work, reasonably safe equipment and, in fact, furnished him

with defective equipment, and failed to exercise ordinary and reasonable care under the circumstances then existing. Specifically, plaintiff claimed defendant's roadbed at the point of the accident was in an unsafe condition; that the push car provided plaintiff and fellow employees on the day of the accident was in a defective and unsafe condition; and that fellow employee Ralph Graves was riding contrary to defendant's rule No. 27. There was some evidence of side sway and up and down motion of the push car which was as much or more so than usual (R. pp. 10, 17, 18). There was no evidence that there was a tremendous amount of side sway nor any terrific jerk up to the time the accident occurred. There was no evidence that a ten-inch pin bolt ever worked out of a similar coupling by either side sway or up and down motion. There is evidence that the same type of coupler in use at the time of this accident is used by other railroads (R. pp. 39, 40, 41). There was, in short, no evidence from which the jury could have found that the swaying or up and down motion of the push car could have resulted in working the pin out of the coupler—contrary to the statement of the Circuit Court (App. B, p. 20, infra).

On September 22, 1955, defendant filed its notice of appeal. By order of the United States District Court, District of Minnesota, Third Division, dated October 28, 1955, the time for filing the record on appeal and for docketing same was extended to December 17, 1955. In its brief defendant assigned as error the following:

A. There was insufficient evidence for submission to the jury on the issue of defendant's negligence and that such negligence, if any, was the proximate cause of plaintiff's injuries.

B The Trial Court erred in its instructions to the jury.

C. The Trial Court erred in admitting over defendant's objections the testimony of Orville J. Smith and all evidence relating to trailer cars.

D. Plaintiff's counsel was guilty of misconduct in his final argument to the jury.

The Circuit Court of Appeals, Eighth Circuit, affirmed the judgment of the lower court, holding that the defendant was guilty of negligence in failing to exercise ordinary care to furnish plaintiff with a reasonably safe place in which to work and in failing to furnish him with reasonably safe appliances and equipment with which to work, and that such negligence was the proximate cause of the accident resulting in plaintiff's injuries (App. B, p. 21, infra). The Circuit Court declined to consider defendant's assignments of error B and C. As to defendant's assignment of error D, the Court held that there was no misconduct on the part of plaintiff's counsel in final argument to the jury.

REASONS FOR GRANTING THE WRIT

1. The principal issue is whether the Circuit Court of Appeals, Eighth Circuit, erred in refusing to reverse the United States District Court for its failure to direct a verdict in favor of defendant at the close of all the evidence or grant judgment notwithstanding the adverse verdict of the jury on the ground there was insufficient evidence for submission to the jury on the issue of defendant's negligence and that such negligence, if any, was the proximate cause of plaintiff's injuries.

This question is of the utmost importance, not only to the litigants before the Court in this instance, but also to all litigants engaged in actions arising under the Federal

Employers' Liability Act. Section 51 of that Act, Title 45 U.S.C., in substance provides that every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury while employed by such carrier where such injury results from the negligence of the common carrier or its agents.

Plaintiff had the burden of proving by a fair preponderance of the evidence that his injuries, as a result of the accident of June 25, 1953, were proximately caused by the negligence of the defendant. It is true that the Court must view the evidence in the light most favorable to the plaintiff in determining whether plaintiff has sustained his proof. Nevertheless, taking plaintiff's evidence as a whole, it is clear that there was insufficient evidence of negligence on the part of the defendant for the trial court to have submitted the case to the jury.

Plaintiff's sole proof of defendant's negligence and that such negligence was the proximate cause of plaintiff's injuries is no more than an inference arising upon other proven facts. Plaintiff at the most has shown by his evidence that there was some side sway and up and down motion of the push car; that the push car was not equipped with hand holds and seats; and that the pin bolt connecting the push car coupling with the motor car coupling did not have a nut at its bottom. Thus, the only proof of how the accident occurred was but an inference from these facts. The actual occurrence of the accident—how and why it happened—is left to mere speculation and conjecture. For this reason the case should never have been submitted by the trial court to the jury.

It is clear that the decision of the Circuit Court of Appeals in the instant case is in conflict with *Pennsylvania Railroad*

Company vs. Chamberlain (1933), 288 U. S. 333, 77 L. Ed. 819. The proven facts in the instant case give rise to two inconsistent inferences of fact: that is, did the push car and the motor car become uncoupled before or after employee Graves fell from the push car? There is equally as much evidence to support the inference that Graves fell from the front of the push car where he was seated before they became uncoupled as there is that he fell afterward. In the *Chamberlain* case, this Court held that where proven facts give equal support to each of two inconsistent inferences, judgment as a matter of law must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recover.

Moreover, the instant case is in conflict with this Court in *Moore vs. Chesapeake & Ohio Railway Co.* (1951), 340 U. S. 573, 95 L. Ed. 547. In that case plaintiff's decedent was standing on the foot board of a tender being moved by an engine. Decedent fell from the foot board and was killed. The Court (at page 550, L. Ed.) states:

> "The burden was upon petitioner to prove that decedent fell after the train stopped without warning, which was the act of negligence she charged. Her evidence showed he fell before the train stopped. The only evidence which petitioner can glean from this record to support her charge is the engineer's testimony that there was no one around the switch as the train approached it, and that he did not know whether 'they' intended to take all of the thirty-three cars out of the switch at one time, or to stop and cut off some of them. From this it is said a jury might reasonably infer that the engineer decided to make and did make an emergency stop which threw decedent from the tender. * * *
>
> "Hence, all the evidence shows is that decedent fell before the train stopped. If one does not believe the

engineer's testimony that he stopped after—indeed, because of—the fall, then there is no evidence as to when decedent fell. *There would still be a failure of proof.*

"To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. *Speculation cannot supply the place of proof. Galloway v. United States,* 319 U. S. 372, 395, 87 L. Ed. 1458, 1473, 63 S. Ct. 1077." (Emphasis ours)

See, also, *Gulf, Mobile & Northern Railroad Co. vs. Wells* (1928), 275 U. S. 370, 72 L. Ed. 371.

2. The decision of the United States Court of Appeals, Eighth Circuit, in the instant case is in conflict with other decisions of that same Court.

See *Henwood, Trustee, vs. Coburn, Adm.*, Eighth Circuit, 1948, 165 F. 2d 418; and *Chicago & Northwestern Railway Co. vs. Garwood* (1948), 167 F. 2d 848.

Conversely, the instant case is closely analagous to the holding of that Court in *Chicago, St. Paul, Milwaukee and Omaha Railway vs. Arnold* (1947), 160 F. 2d 1002, citing numerous cases in support thereof, which held that an employee's disregard of a specific order or of a standing rule promulgated for his safety bars recovery though the injury of the employee was due as well to the negligence of other employees of the railway company. The uncontroverted evidence is that plaintiff immediately before the accident was riding in a sitting position on a water keg about in the center of the push car and that this is contrary to the rules of the railroad for riding on push cars. (R. pp. 8, 16)

The Circuit Court in explaining and limiting the *Arnold* case, supra, states as follows in the *Garwood* opinion:

> "* * * To what was said in the Coburn case we may add that in the Arnold case there was testimony for the appellant that the injured employee's superior gave him a specific warning of the hazard with which he was confronted, amounting in effect to an express command to abandon the position which exposed him to the risk of injury. * * *"

In the instant case we have precisely that situation inasmuch as plaintiff was the section foreman, had had long years of experience with this type of push car and with the section of track along which the push car was traveling at the time of the accident. In fact, it was plaintiff's duty to maintain this track in a state of good repair. Certainly there was no one other than himself who owed plaintiff a warning as to the dangers of violating this rule No. 77 specifically prohibiting the riding on water kegs, carried on push cars and like railroad vehicles.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

TITLE 28, U.S.C., SECTION 1254

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By a writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) * * * * *

(3) * * * * *"

TITLE 45, U.S.C., SECTION 51

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

APPENDIX B

OPINION

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,485

Chicago Great Western Railway Company, a Corporation, Appellant,

vs.

Leon Scovel, Appellee.

Appeal from the United States District Court for the District of Minnesota.

[May 10, 1956]

David L. Grannis, Jr. (Grannis & Grannis and Luther M. Stalland were with him on the brief), for Appellant.

Charles T. Hvass (Hvass, Weisman, Peterson, King & Schwappach were with him on the brief), for Appellee.

Before GARDNER, Chief Judge, and JOHNSEN and VOGEL, Circuit Judges.

GARDNER, Chief Judge.

Appellee Leon Scovel brought this action against the Chicago Great Western Railway Company to recover damages for personal injuries suffered by him while he was in the employ of appellant. The parties will be referred to as they were designated in the trial court. At the time of receiving his injuries plaintiff was employed by defendant on its railroad, a common carrier engaged in interstate commerce, as a section foreman. In his complaint he charged defendant with negligence in the following particulars: (1) That it failed to furnish him with a reasonably safe place in which to work; (2) That it failed to furnish him with equipment that was in reasonably safe condition for the purpose for which it was to be used; (3) That it furnished him with equipment that was defective and in a state of disrepair; and (4) That it failed to exercise ordinary and reasonable care under the circumstances then existing.

Defendant by its answer denied all of the allegations of negligence contained in the complaint and alleged affirmatively that plaintiff's injuries were caused solely by his own negligence. The action was tried to the court and a jury. At the close of all the evidence defendant interposed a motion for a directed verdict on the grounds that "* * * no actionable negligence against it or any of its employees has been proved and as a matter of law appears that any injuries plaintiff received were a result of or caused proximately by his own contributory negligence." The court announced that it would reserve ruling on the motion until after verdict. The jury returned a verdict against defendant and in favor of plaintiff on all the issues. In due course the defendant moved for judgment notwithstanding the verdict, which motion the court overruled and entered judgment in favor of plaintiff and against defendant pursuant to the

verdict. Defendant has appealed from the judgment so entered and seeks reversal on substantially the following grounds: (1) There was insufficient evidence for submitting to the jury the issue of defendant's negligence and that such negligence, if any, was the proximate cause of plaintiff's injuries; (2) The trial court erred in its instructions to the jury; (3) The trial court erred in admitting over defendant's objections the testimony of Orville J. Smith and all evidence relating to trailer cars; and (4) Plaintiff's counsel was guilty of misconduct in his final argument to the jury.

Before considering the merits of defendant's contentions we shall refer to the condition of appellant's brief. Rule 11(b) of this court provides that the brief shall contain, inter alia:

> "A concise statement of the case in so far as is necessary for the court to understand and decide the points to be argued in the brief, giving the pages of the printed record where each fact stated can be found and verified. If a point relates to the admission or exclusion of evidence, the statement shall quote the evidence referred to, and any objections or other equivalent action taken relative thereto, together with the rulings of the court thereon, giving the pages of the printed record on which the quotations appear. * * * If a point relied upon relates to the giving of instructions or the refusal to give instructions requested, the statement shall quote the portions of the instructions or of the requested instructions which are referred to, the objections or exceptions taken to the giving of the instructions or to the refusal to give requested instructions and the rulings of the court thereon, and shall give the pages of the printed record on which the quotations appear."

By inadvertence or otherwise, this rule has not been complied with. So far as any attempt is made to present rulings

of the court on the admissibility of evidence, neither in the statement of the case nor in the points to be argued is to be found the evidence referred to, nor any objections or other equivalent action taken relative thereto, nor any rulings of the court thereon.

The brief is equally lacking in the essential requisites to present for review the correctness of the court's instructions. In this regard the brief is absolutely silent in the statement of the case and the points to be argued as to any quotation from "* * * the portions of the instructions or of the requested instructions which are referred to, the objections or exceptions taken to the giving of the instructions or to the refusal to give requested instructions and the rulings of the court thereon * * *." We are, at most, invited to search the record for error in this regard. In this state of the record we are warranted in disregarding these allegations of error and we shall pass them without discussing in detail the rulings complained of. We have, however, satisfied ourselves that there has been no miscarriage of justice and that no prejudicial error was committed by the trial court regarding any of these rulings now complained of.

The substantial question presented on this appeal is whether or not the court erred in not granting defendant's motion for a directed verdict interposed at the close of all the evidence or in denying his motion for judgment notwithstanding the adverse verdict of the jury.

In considering this question we must view the evidence in a light most favorable to the prevailing party and we must assume that all conflicts in the evidence have been resolved by the jury in his favor and that the evidence proves all facts which it reasonably tends to prove. The prevailing party is also entitled to the benefit of all such favorable inferences

as may reasonably be drawn from the evidence. If, when so considered, reasonable minds might reach different conclusions then the case presents issues of fact to be submitted to the jury and not issues of law to be determined by the court. *Lowden v. Hanson*, 8 Cir., 134 F. 2d 348; *Carter Carburetor Corp. v. Riley*, 8 Cir., 186 F. 2d 148; *Chicago, Rock Island & Pacific Railroad Co. v. Lint*, 8 Cir., 217 F. 2d 279; *Gunning v. Cooley*, 281 U. S. 90.

With this rule in mind we turn to a consideration of the evidence. At the time of the accident plaintiff was employed by the defendant as a section foreman. He was a man of wide experience in the work of maintaining railway physical structures, including the roadbed, ballast, ties and rails. As section foreman he was in charge of a crew of thirteen workmen. They were furnished for use in transporting themselves, their necessary tools, and at times material, two cars, one designated as a motor car and the other as a push car. The push car was attached to the rear end of the motor car by means of a metal coupler with a flange at each end, one end of which fitted onto a protruding member at the back end of the motor car and the other end of which fitted onto a protruding member on the front end of the push car. There was a hole through the flanges and through the protruding members, and through this hole was fitted a pin or bolt about eight or ten inches in length so that there were two bolts in this completed coupling. The bolts had no nut nor other means of holding them in place but they had a head at the top and could not slip through the hole provided. The motor car was propelled by a gasoline engine and was equipped with seats to accommodate eight workmen. The push car had a flat board floor with no railing or seats of any kind for

the accommodation of workmen. It had metal hand holds for the purpose of enabling workmen to remove it from the tracks.

On the morning in question plaintiff with a crew of thirteen men, eight of whom were on the motor car and five of whom were on the push car, started east on defendant's railroad from the town of Lamont, Iowa, proceeding toward a portion of the track and right of way which they were engaged in surfacing, which was a part of the duty of plaintiff and the section men composing his crew. Plaintiff and five other members of his work crew who were riding on the push car were furnished no accommodations or facilities for sitting down and dared not stand up so they sat on the flat surface with folded legs, referred to in the record as Indian fashion. Plaintiff was sitting on a keg in about the middle of the flat surface of the push car and one of the section men was sitting on the front end of the push car with his feet against the motor car. While thus proceeding at a rate of from ten to fifteen miles per hour one of the coupling pins in some manner not definitely known worked out of the coupling. When this happened the push car slackened its speed leaving a space between it and the motor car. This apparently unbalanced the workman who had his feet against the motor car and he fell forward and grabbed the bar across the front end of the push car, his head forward and his face upward. While in this perilous situation the motor car slackened its speed and plaintiff, observing the danger that the motor car would come in contact with the workman's head, dashed forward to rescue him and in doing so fell in front of the push car, receiving serious injuries by being run over. There was evidence to warrant the jury in finding that the push car was an old, badly worn piece of equipment. The wheels were worn and out of alignment so that when

propelled it swayed from side to side and also up and down. There was evidence from which the jury could have found that this swaying motion and up and down motion of the push car could have resulted in working the pin out of the coupler. There was evidence that this danger could have been avoided by placing a nut at the bottom of the steel pins. There was also evidence that the plaintiff had complained to the defendant about the inadequacy and defective condition of this push car, particularly for the transportation of workmen, and there was evidence that other push cars or trailers in general use were equipped with facilities for seating the workmen being transported. There was expert testimony that the coupling device used on these cars was an unsafe device and that it was not a safe practice to require men to ride on a push car such as was involved in this accident and that there were other types of trailer cars in general use that were safe for the transportation of workmen. True, there was conflict in the evidence but as above noted we assume that all such conflicts were resolved in favor of the plaintiff.

Defendant's liability in this case must be determined under the provisions of the so-called Federal Employers' Liability Act. Under that act the railroad company is not an insurer of the safety of its employees and to entitle an employee to recover for personal injuries it is incumbent upon him to prove that his injuries resulted in whole or in part from the negligence of the carrier. 45 U.S.C.A., Section 51. It is the duty of the railroad company to exercise ordinary care to furnish the employee with a reasonably safe place in which to work and to supply him with reasonably safe appliances and equipment. This, however, is not the limit of its duty toward the employee. It is also under the continuing duty of

exercising ordinary care to see that the place where he is required to work is maintained in a reasonably safe condition and that the instrumentalities and appliances furnished for the use of the employee are reasonably fit for the intended use. *Lowden v. Hanson*, supra; *Phillips Petroleum Co. v. Manning*, 8 Cir., 81 F. 2d 849.

It is contended that the plaintiff was guilty of negligence. The Federal Employers' Liability Act, however, abolishes many of the defenses available under the common law. As said by us in *McGivern v. Northern Pacific Ry. Co.*, 8 Cir., 132 F. 2d 213:

> "The Federal Employers' Liability Act abolished certain defenses so far as common carriers engaged in Interstate Commerce are concerned, which were recognized at common law, in favor of an employer when sued for personal injuries received in the course of employment by an employee. Thus it abolished the defense embodied in the fellow servant rule; the defense of contributory negligence and the defense of assumption of risk. *Minneapolis, St. P. & S. S. M. Ry. Co. v. Rock*, 279 U. S. 410, 49 S. Ct. 363, 73 L. Ed. 766; *Moore v. Chesapeake & O. R. Co.*, 291 U. S. 205, 54 S. Ct. 402; 78 L. Ed. 755."

The question of whether or not plaintiff's injuries were proximately caused by the negligence of defendant or were caused solely by plaintiff's own negligence was clearly a question of fact to be determined by the jury and the jury's verdict is conclusive on that question. If plaintiff was contributorily negligent that in itself was not a defense but only went to the question of the amount of recovery. We are convinced that the jury under the evidence was warranted in finding the defendant guilty of negligence in that it failed to exercise ordinary care to furnish plaintiff with

a reasonably safe place in which to work and in failing to furnish him with reasonably safe appliances and equipment with which to work and that such negligence was the proximate cause of the accident resulting in plaintiff's injuries.

It remains to consider the contention that defendant was deprived of a fair trial because of the alleged misconduct of counsel for plaintiff in his argument to the jury. The particular part of the argument complained of consists of the statement by plaintiff's counsel that there was a rule of defendant railroad that an employee must go to the rescue of another employee and company property and a further statement that defendant put in contributory negligence charges to convince one or two jurors that plaintiff shouldn't get what he is entitled to.

It is argued that there was no rule of the railway company requiring an employee to go to the rescue of another employee. Whether there was or was not we think quite immaterial in the circumstances disclosed by the testimony. Plaintiff was suddenly confronted with an emergency. A fellow workman was apparently in imminent danger of death or bodily injury. In such circumstances he could not be charged with primary or contributory negligence. In fact, in cases of such emergency the employee, on his own volition, may step outside the line of his usual duties in an attempt to save himself from injury, to rescue another employee from danger or to save his employer's property. 35 Am. Jur., Master and Servant, pg. 597; *Miller v. Elgin, Joliet & Eastern Ry. Co.*, 7 Cir., 177 F. 2d 224; *Green v. Standard Wholesale Phosphate & Acid Works*, D. C., Md., 29 F. 2d 746. In 56 C. J. S., Master and Servant, pg. 1309, the rule is succintly stated as follows:

> "The law has so great a regard for human life that it will not impute negligence in an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons."

It was therefore immaterial whether counsel's remarks with reference to defendant's rules were warranted or not. Regardless of any rule of the railroad company the applicable rule was substantially that stated by counsel for plaintiff. As to the statement in counsel's argument with reference to defendant's purpose in introducing evidence of plaintiff's contributory negligence the remarks quoted do not fairly reflect what counsel said on the subject. He in fact said:

> "I don't believe there is any evidence at all of any contributory negligence on the part of Mr. Scovel. The reason why the railroad talks about contributory negligence is that under the Federal Employers' Liability Act if an employee is guilty of some negligence himself that tends, that diminishes his damages, in other words, if an employee is guilty of negligence of 10 per cent, then he only gets a 90 per cent recovery of what his damages are. So, consequently, if a railroad can convince one or two of perhaps the members of a jury that the employee himself is partly responsible for the accident, then they gain their objective in holding back from the man the compensation that he is, or that he should be entitled to under the Federal Employers' Liability Act."

When the statement is considered in its entirety it is well within the scope of legitimate advocacy. It is also to be noted that there is here no claim that the damages awarded plaintiff were the result of passion or prejudice or were excessive. We are of the view that the remarks objected to cannot be urged as prejudicial to the defendant as they were well

within the scope of the evidence and inferences that might legitimately be drawn therefrom.

The judgment appealed from is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

ADDENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,485—September Term, 1955
Thursday, May 10, 1956

Chicago Great Western Railway Company,
Appellant,

vs.

Leon Scovel,
Appellee.

Appeal from the United States District Court
for the District of Minnesota

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

May 10th, 1956